Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Teamsters Canada Rail Conference,

applicant,

and

Canadian Pacific Railway Company,

respondent.

Board File: 29785-C
Neutral Citation: 2013 CIRB 679
March 22, 2013

On January 23, 2013, the Teamsters Canada Rail Conference (TCRC or the union) filed an application with the Canada Industrial Relations Board (the Board) pursuant to section 23 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*), requesting that the Board file Board Order No. 699-NB, issued December 19, 2012, in the Federal Court of Canada. That order directed the Canadian Pacific Railway Company (CP Rail or the employer), to do and to refrain from doing certain things.

The Board, composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Daniel Charbonneau and Robert Monette, Members, conducted an oral hearing regarding the union's application on March 18, 2013. Having considered the written and oral submissions of the parties and the evidence presented, the Board has determined that the circumstances warrant the filing of Order No. 699-NB in the Federal Court. These are the reasons for that decision.

Appearances

Mr. Michael A. Church, for Teamsters Canada Rail Conference;

Messrs. Charles G. Harrison and Ron Hampel, for Canadian Pacific Railway Company.

I–Nature of the Application

[1] The TCRC is the certified bargaining agent for a unit of running trades employees (locomotive engineers, conductors, trainmen and yardmen - the LE & CTY unit) employed by CP Rail. There are four separate collective agreements applicable to various components of the LE & CTY unit ("General Committee of Adjustment"), all of which expired on December 31, 2011.

[2] Notices to bargain for renewal of these collective agreements were served on August 31, 2011. When direct bargaining failed to produce an agreement, the employer filed a notice of dispute with the Minister of Labour in February 2012. Conciliation and mediation efforts were unsuccessful and the union commenced legal strike action on May 23, 2012. On May 31, 2012, Parliament enacted Bill C-39, the *Restoring Rail Service Act*, S.C. 2012 c.8 (the *RRSA*). This statute, which came into force on June 1, 2012, terminated the work stoppage and imposed binding arbitration as the mechanism for resolving the terms of new collective agreements between the parties.

[3] Mr. William Kaplan was appointed as the arbitrator pursuant to the *RRSA* and arbitration proceedings were in progress when, on or about September 10, 17, 20 or 26, 2012 (depending on the General Committee of Adjustment), the employer issued notices purporting to cancel numerous "local rules" on 30 or 60 days' notice and cancelling all verbal rules effective immediately.

[4] The union filed a complaint with the Board on October 1, 2012, in which it alleged that the employer's conduct in giving notice to cancel virtually every written and verbal local agreement violated the *RRSA* and sections 50(*a*), 50(*b*), 94(1)(*a*) 94(3)(*a*), 94(3)(*b*) and 96 of the *Code*. The union also requested interim relief pursuant to section 19.1 of the *Code*.

[5] The Board issued an interim order in the nature of an injunction on October 19, 2012 (Order no. 696-NB), in which it ordered the employer to cease and desist from implementing

wholesale cancellations of local rules until such time as the Board had issued a determination on the merits of the TCRC's complaint, or a new collective agreement had come into force. In making this order, the Board was cognizant of the fact that the parties were, at the time, still engaged in the arbitration process imposed on them by the *RRSA*.

[6] On December 19, 2012, the Board issued a decision on the merits of the union's complaint, *Canadian Pacific Railway Company*, 2012 CIRB 669 (RD 669), in which it held that the wholesale cancellation of the local rules by the employer constituted a violation of section 94(1)(a) of the *Code*. To remedy the violation of the *Code* that it had found CP Rail to have committed, the Board issued Order no. 699-NB, which superceded 696-NB and, *inter alia*, ordered the employer to cease and desist from implementing wholesale cancellations of local rules. Unlike the interim order it replaced, Order 699-NB did not contain a limitation on its duration.

[7] Co-incidentally, the arbitrator's award resolving the terms of the new collective agreements between the parties (the Kaplan award) was also issued on December 19, 2012. The arbitrator ruled that, unless directly dealt with in the award, all outstanding employer and union proposals were dismissed. The arbitrator retained jurisdiction on all matters until such time as the parties had executed new collective agreements.

[8] Commencing on or about December 20, 2012, the employer issued formal notification to the local union chairpersons in every terminal across Canada that it was exercising the 30 or 60 day cancellation provision for all or most of the local rules. These letters were substantially similar to those the employer had issued in September 2012 that were the subject of the Board's December 19, 2012 decision and order.

II–Positions of the Parties

A–The Union

[9] The union asserts that by issuing these new cancellation notices, the employer has again implemented the wholesale cancellation of the local rules, and has thereby failed to comply with Order no. 699-NB.

[10] The union admits that each of the local rules packages contains a provision that permits some or all of the rules in that package to be cancelled on 30 or 60 days' notice. However, it argues that it is the wholesale cancellation of local rules by the employer that is prohibited by the Board order.

[11] The union advises that the employer has undertaken a significant number of changes within a short period of time in the name of cost savings. These major changes have caused significant upheaval within the bargaining unit, inciting numerous grievances and placing enormous strains on the union's ability to properly represent its membership. Over and above the cancellation of all or most of the local rules, the employer has implemented initiatives that were rejected or withdrawn during bargaining or denied by the arbitrator (for example, standardized calling rules) as well as introducing material changes (for example, extended runs and the Sparwood run through). Although the union does not contest the employer's right to make material changes in accordance with the collective agreement, the cumulative result of having to deal with all of these employer initiatives at once has strained the union's resources past the breaking point. A number of local chairmen have resigned and several of the union's divisions have exhausted their finances. As local managers have no authority to resolve issues, the union's ability to address the membership's grievances in a constructive manner is limited or non-existent. Recourse through the grievance process is illusory, as the large number of grievances over alleged violations of the collective agreement is clogging the parties' already overburdened grievance arbitration system. As a consequence, union members are questioning the value of the collective agreement and their union membership. The union asserts that the situation is now even worse than it was in October 2012 when the employer purported to cancel just the local rules.

[12] The union advises that one of the local rules that was cancelled in each terminal was that providing time off for union business. Although the managers are still authorizing such time off, the employer has reduced the number of union representatives who are entitled to such leave. The union also notes that managers have been booking union representatives to be on duty without regard to the fact that they are engaged in union work, rather than allowing them to hold their turn and book on when they have completed that work. The union suggests that this new practice can result in potential violation of the work/rest regulations.

[13] The union admits that in two terminals in British Columbia, Port Coquitlam and Roberts Bank, the union was able to persuade the employer to accept modifications to the standardized calling rules, but notes that there are still a number of unresolved disagreements in those terminals. It also notes that some of the rules that the employer has cancelled have no financial implications for CP Rail, citing as an example the "short turn" rule, which has the effect of equalizing income among employees within a terminal. The union also provided evidence of the dissension that the standardized calling rules imposed by the employer have had in other terminals, such as Calgary, where engineers who do not have sufficient seniority to hold a locomotive engineer's position are being called to work prior to locomotive engineers with seniority. The union asserts that, due to the cancellation of the local rules, the employer's unilateral implementation of standardized calling rules has resulted in numerous violations of the collective agreement. As a result, employees are not certain when they will be required to work and can be caught short without sufficient rest or assigned to runs with which they are not familiar.

[14] The union states that, while it is willing to engage with the employer, the manner in which the employer has proceeded has overwhelmed the union's capacity to respond and properly represent its members.

[15] The union requests that, in view of the employer's ongoing non-compliance with Order no. 699-NB, it be filed with the Federal Court pursuant to section 23 of the *Code*.

B–The Employer

[16] The employer denies the allegation that it has failed to comply with Order no. 699-NB. It states that it posted the order in the workplace, as required and maintained the local rules in place during the notice period. It contends that issuing notices of cancellation is not the same as cancelling the local rules, and that it has not instituted wholesale cancellation of the local rules.

[17] However, the employer admits that, after the date on which Order no. 699-NB was issued, its superintendents were instructed to and did send new notices to the union's local chairmen, advising that the employer was cancelling the local rules packages in each terminal. CP Rail states that in doing so, it is merely exercising its collective agreement right. It asserts that the

system-wide cancellation of local rules was necessary to permit it to implement standardized calling rules in their place. It argues that the net result of its action is to modify rather than cancel the existing calling rules. The employer admits that the calling order was previously a matter that was governed through local rules in each terminal. It states that the employer's intention was to hold meetings with union representatives in each terminal to undertake a review of the local rules, in order to determine which rules would be retained, modified or cancelled. However, the employer admits that the document that emerged from the consultations it held with union representatives in Port Coquitlam and Roberts Bank takes the form of a directive from the Crew Management Centre, rather than an agreement between the parties.

[18] The employer suggests that many of the examples raised by the union in this proceeding do not relate to the cancellation of local rules, and are matters that can be dealt with through the grievance arbitration process.

[19] The employer explains that it complied with the Board's interim order of October 19, 2012 and reinstated all of the local rules that it had previously cancelled. However, it suggests that the cancellation notices that it sent after the Board's final order of December 19, 2012 was issued were sent in very different circumstances and were therefore not subject to the Board's order. The employer points out that, in RD 669, the Board indicated that the employer's actions in cancelling a large majority of the local rules "at the time and in the manner it did" violated section 94(1)(a) of the *Code*. It suggests that the circumstances had changed by December 20, as the arbitrator had, by then, ruled on the terms to be included in the collective agreement. The employer also followed a different process with respect to the December cancellation notices, as it invited the union representatives to meet with local management at each terminal to discuss the rules cancellation. In some terminals (Port Coquitlam and Roberts Bank), changes were made based on the discussion with the union. It suggests that discussions were less successful in other terminals due to the union's failure to engage with local management in those locations. According to the employer, the time and manner in which the December cancellation notices were issued was fundamentally different than the circumstances that existed when the Board heard the union's October 1, 2012 complaint and issued the interim and final orders.

[20] The employer submits that the December 2012 Board order could not have been intended to prevent it from cancelling local rules for all time. It notes that the local rules themselves provide that either party can give notice of cancellation in whole or in part and that neither the Kaplan award or the Board order removed this right.

[21] The employer suggests that Order no. 699-NB is ambiguous and would be difficult to enforce. It points out that while the interim order had a temporal limitation, this feature was not replicated in the final order. It submits that the Board could not have intended the cease and desist order to operate indefinitely. It also questions the meaning to be attributed to the word "wholesale" in the context of the cease and desist order, asking whether it refers to the number of cancellations or the manner in which the local rules were cancelled.

[22] The employer also notes that the union has filed a number of grievances and suggests that this is evidence that the union's ability to contest the employer's actions has not been compromised by the cancellation of the local rules. It also provided evidence that the employer has granted a proportionately equivalent amount of leave for union business in the first two months of 2013 as it did in 2012.

[23] CP Rail submits that it has not wholly failed to comply with Order no. 699-NB and that it would serve no useful purpose to file the order in the court.

III–Analysis and Decision

[24] Section 23 of the *Code* provides as follows:

> 23. (1) The Board shall, on the request in writing of any person or organization affected by any order or decision of the Board, file a copy of the order or decision, exclusive of the reasons therefor, in the Federal Court, unless, in the opinion of the Board,
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> (a) there is no indication of failure or likelihood of failure to comply with the order or decision; or
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> (b) there is other good reason why the filing of the order or decision in the Federal Court would serve no useful purpose.
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> (2) Where the Board files a copy of any order or decision in the Federal Court pursuant to subsection (1), it shall specify in writing to the Court that the copy of the order or decision is filed pursuant to that subsection and, where the Board so specifies, the copy of the order or decision shall be accepted for filing by, and registered in, the Court without further application or other proceeding.
>
> (3) When a copy of any order or decision of the Board is registered pursuant to subsection (2), the order or decision has the same force and effect as a judgment obtained in the Federal Court and,

> subject to this section and the Federal Courts Act, all proceedings may be taken thereon by any person or organization affected thereby as if the order or decision were a judgment of that Court.

[25] The Board is rarely called upon to file its orders with the Court. However, certain principles can be discerned from the jurisprudence that has emerged since this provision was added to the *Code* in 1978:

- the Board expects its orders to be obeyed, but in the unusual cases in which they are not, section 23 of the *Code* provides a vehicle for judicial enforcement of Board orders;
- the Board has wide discretion as to whether or not to file one of its orders in the court;
- the Board's role is not to punish parties, but to remedy breakdowns in labour relations and encourage the constructive settlement of disputes and differences between the parties;
- the filing of a Board order in court is a measure of last resort; the Board will not lightly subject parties to measures of this nature unless it is clear that there is no other enforcement mechanism that will ensure compliance with the order and the objectives of the *Code*.

[26] In RD 669, the Board found that the written local agreements between CP Rail and the TCRC govern the working conditions, rights and privileges of the bargaining unit members in the particular terminal to which they apply. These rules make it possible for the local union representatives to advise union members as to how the collective agreement will be interpreted and applied in their terminal. It also permits the local union representatives to determine, with some degree of confidence, whether there are grounds for a grievance at the local level over a particular employer action. The Board determined that the written local rules are therefore an important aspect of the union-management relationship, as they contribute to the effective administration of the trade union and its representation of employees in the bargaining unit. Based on its view of the important role of the local rules, the Board went on to say:

> [21] In *Bell Canada*, 2001 CIRB 116, the Board held that an employer's unilateral implementation of a policy affecting the employees' terms and conditions of employment conflicts with the union's representation of its members. In the Board's view, **the employer's wholesale cancellation of the majority of local agreements constitutes a similar interference with the TCRC's ability to represent the members of its bargaining units at CP Rail**. Furthermore, the cancellation of the local agreements that dealt with time off for local union representatives to conduct union business also interfered with the representation of employees by the TCRC.
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> [22] In the Board's opinion, the cancellation of the local agreements will have a substantial impact on the members of the bargaining unit and their bargaining agent. The employer has not demonstrated

> any compelling business reasons for its wholesale cancellation of the local agreements. The Board therefore finds that the wholesale cancellation of the local agreements by the employer constitutes a violation of section 94(1)(*a*) of the *Code*.
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> (emphasis added)

[27] The Board notes that the employer did not ask the Board to reconsider RD 669 or Order no. 699-NB or to amend, alter or vary the order, pursuant to section 18 of the *Code*, nor did it seek judicial review of the decision and/or the order. The employer simply adopted an interpretation of the order that suited its own purposes, and issued new notices of cancellation affecting virtually every local rule in every terminal in the CP Rail system.

[28] The Board was very deliberate in its drafting of Order no. 699-NB, and it did intend the order to indefinitely prohibit the employer from unilaterally cancelling and replacing the local rules on a system-wide basis. Accordingly, the Board has no difficulty in finding that the employer has failed to comply with Order no. 699-NB, and that given the employer's past conduct, there is every likelihood that it will continue to fail to comply with the order in the future.

[29] The Board's mandate is to encourage constructive labour-management relations, in accordance with the Preamble to the *Code*. In the circumstances of this case, the Board has not been persuaded by the employer's argument that there is no useful purpose to be served by filing the order. Constructive labour-management relations require that the employer and the union jointly negotiate the terms and conditions of employment that will apply to the members of the bargaining unit and, in so doing, conduct themselves in a reasonable manner. In addition to interfering with the administration of the union and the representation of employees by the union, CP Rail's wholesale cancellation of local rules, which have been negotiated and agreed to by the parties over many years, for the purpose of replacing them with managerial directives, is clearly not conducive to constructive labour relations. By its actions, the employer has made it virtually impossible for the labour-relations system to work as it should. It has done so at a time when the union and its members have no means by which to compel bargaining, as there is a collective agreement in place and the employees are prohibited from legally engaging in collective job action. In the Board's view, the only mechanism currently available to cause the

employer to engage in meaningful bargaining with the union regarding the system-wide changes that it wishes to make is the filing of Order no. 699-NB in the Federal Court.

IV–Conclusion

[30] For the reasons set out above, the Board will undertake the steps necessary to file Order no. 699-NB in the Federal Court. The parties will be advised once the filing has taken place.

[31] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Daniel Charbonneau
Member

Robert Monette
Member